IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-250

AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE, a District of Columbia Corporation; HAROLD STEELE, JOSEPH H. JOHNSTON, ROBERT W. BOGEN, and DR. FORREST F. EVANS of Nashville, Tennessee, *Appellants*,

vs.

RAY BLANTON, Governor of the State of Tennessee and Chairman of the Tennessee Student Assistance Corporation; R. A. ASHLEY, JR., Attorney General of the State of Tennessee; HARLAN MATTHEWS, Treasurer of Tennessee and a Member of the Tennessee Student Assistance Corporation; WILLIAM SNODGRASS, Comptroller of Tennessee and a Member of the Tennessee Student Assistance Corporation; DR. WAYNE BROWN, Vice-Chairman of the Tennessee Student Assistance Corporation; Dr. NYLES C. AYERS, DR. EDWARD BOLING, MR. CLAUDE BOND, MR. FRANK BROGDEN, MR. JOSEPH COPELAND, DR. SAM INGRAM, MR. W. L. JONES, and DR. ROY NIX, Members of the Tennessee Student Assistance Corporation, *Appellees*,

and

LORETTA P. BEARD, MARGARET B. BROOKS, GLORIA A. BROWN, BRENDA S. HUMFLEET, ARLILLIAN JONES, COLLEEN KEHLER, LAWRENCE H. NEWBELL, ADDIE MARIE REID, RAYMOND A. SHRIVER and JOHN W. SMYTHIA, *Intervenor-Appellees*.

On Appeal from a Three-Judge United States District Court for the Middle District of Tennessee

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees Loretta P. Beard, *et al.*, intervenor-defendants below, move to affirm the judgment of the district court on the ground that the district court faithfully adhered to and applied the constitutional principles set forth in this Court's decisions on the Establishment Clause issues presented by this appeal, thus rendering the question presented so unsubstantial that further review by this Court is unnecessary.

QUESTION PRESENTED

Does the Tennessee Student Assistance Program, which provides financial assistance to needy students to attend the college of their choice—whether it be a public or nonpublic or a sectarian or nonsectarian college—violate the Establishment Clause of the First Amendment, as made applicable to the states through the Due Process Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

A. The Challenged Aid Program

At its 1976 session, the Tennessee General Assembly enacted the Student Assistance Program ("Program") to "provid[e] needy students with the financial assistance necessary to attend the accredited college of their choice in Tennessee." 1976 Tenn. Pub. Acts, ch. 415.[1] Consistent with that intent, the enabling legislation provides that "payment of awards shall be

[1] The enabling legislation for the Student Assistance Program is reprinted in full at pages A-1 to A-6 of the Appendix to the Jurisdictional Statement (hereinafter cited as J.S. App.).

made directly to the students." J.S. App., p. A-4.[2] The court below found that legislative directive was implemented by the issuance of state warrants to qualified students made out only in the name of the student. J.S. App., pp. A-20 to A-21.

Awards under the Program are based solely on the financial need of the student and are granted to residents of Tennessee "without regard to . . . race, color, creed, sex, or national origin or ancestry." J.S. App., p. A-4. Awards are available to students at public colleges and universities, public vocational and technical institutes, and nonpublic colleges and universities accredited by the Southern Association of Colleges and Schools. J.S. App., p. A-3. The enabling legislation explicitly provides that "no attempt shall be made" by any official connected with the administration of the Program "to influence the selection by an applicant of the institution which he might attend." J.S. App., p. A-5. During the 1976-77 academic year, more than 2,000 students attending 35 private colleges and 21 public institutions received benefits under the Program.[3]

The maximum award available under the Program is $1,200 or the total amount of tuition and mandatory fees, whichever is the lesser amount. J.S. App., p. A-4.

[2] As noted by the appellants, the legislation enacting the Student Assistance Program expressly repealed an earlier Tuition Grant Program that had been the object of previous litigation. Juris. Stmt., p. 4. Under the Tuition Grant Program, awards were paid not to the students who had qualified for them but directly to the institutions they attended. As the district court acknowledged, that method of payment had prompted it to treat the Tuition Grant Program as one of institutional aid, rather than student aid, in the earlier litigation. J.S. App., p. A-24.

[3] Plaintiffs' Exhibit No. 23.

For the 1976-1977 academic year, the Program was funded at $1.5 million, one-half of which was appropriated by the Tennessee General Assembly and the other half of which was provided by federal matching funds. J.S. App., p. A-21. Because of the limited level of funding, less than one-fourth of all students who applied for assistance received awards.[4]

As the appellants have noted, the opinion of the district court accurately and succinctly summarizes the actual operation of the Program during the 1976-1977 academic year. See J.S. App., pp. A-20 to A-21.

B. The Proceedings Below

The plaintiffs, one organization and four individual taxpayers, filed their complaint challenging the Student Assistance Program on June 23, 1976. Because the plaintiffs sought to enjoin on federal constitutional grounds a statute of statewide application and because the complaint was filed before the repeal of 28 U.S.C. § 2281,[5] a district court of three judges was convened to hear and decide the case.

The complaint named as defendants several state officials responsible for administering the challenged aid program. Subsequently, ten students who had qualified for awards under the Program were permitted to intervene as defendants. Those students attend both public and private colleges.

By agreement of the parties, a single judge was designated to conduct the evidentiary hearing, which began on February 28, 1977, and lasted three days. The

[4] Plaintiffs' Exhibit No. 23.

[5] Pub. L. No. 94-381, 90 Stat. 1119 (1976).

plaintiffs' case consisted of evidence about three of the 39 private colleges and universities in Tennessee and about the lobbying activities of the Tennessee Council of Private Colleges while the Program was being considered by the General Assembly. The state defendants placed in evidence the various documents used in administering the Program and offered the testimony of the two public officials responsible for administering the Program. The ten student intervenors presented testimony about the importance of the Program in financing their college educations.

Immediately following the evidentiary hearing, the district court heard argument by the parties and requested that the parties submit post-hearing briefs. On May 19, 1977, the district court issued its opinion, ruling unanimously that the Student Assistance Program did not violate the Establishment Clause. On the same day, the court entered its judgment dismissing the complaint.

C. The Decision Below

The district court began its constitutional analysis by reciting the three-part test of purpose, primary effect and excessive entanglement that this Court's decisions on the issue of public aid to church-related institutions of higher education have evolved over the past six years. That test was applicable to the appellants' Establishment Clause claim because of the district court's finding that "some, but not all, of the private schools whose students benefited from this program are operated for religious purposes." J.S. App., p. A-22. However, the district court also heeded this Court's admonishment that the three-part test is not

to be applied rigidly and mechanically.[6] Rather, the court recognized that the various components of the three-part test are simply guidelines to assist in identifying when the values protected by the Establishment Clause might be impaired. And the district court correctly identified government neutrality in matters affecting religion as the crucial value that the Establishment Clause safeguards.[7] J.S. App., p. A-23.

Because the appellants conceded that the Tennessee aid program had the requisite secular purpose and had not generated excessive government entanglement with religion or religious institutions, the district court's opinion addressed the single question whether that Program had a primary effect that either advanced or inhibited religion. Recognizing that the analysis employed in this Court's Establishment Clause decisions varied depending on whether the challenged aid was provided directly to church-related schools or to students attending such schools, the district court first addressed appellants' contention that the Student Assistance Program provided direct institutional aid and rejected that contention. J.S. App., pp. A-24 to A-25.

The district court then examined whether the primary effect of the challenged aid program breached the constitutional command of government neutrality by analyzing those decisions of this Court which have applied the so-called "child benefit" theory. With one exception, the district court found that this Court has sus-

[6] *E.g.*, *Meek* v. *Pittenger*, 421 U.S. 349, 358-59 (1975); *Tilton* v. *Richardson*, 403 U.S. 672, 677 (1971).

[7] *E.g.*, *Roemer* v. *Board of Public Works*, 426 U.S. 736, 747 (1976).

tained the constitutionality of aid programs when the aid has been provided to students, or their parents.[8] The exception is *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), in which the Court, *inter alia*, struck down a New York program of tuition grants and tax credits to students attending parochial elementary and secondary schools.[9]

The appellants contended that *Nyquist* was controlling in this case and doomed the Tennessee program. The district court disagreed, noting in part:

> "Here, as in the child benefit cases and contrary to *Nyquist*, state funds are provided to students regardless of whether they attend a private or a public school. Here, contrary to *Nyquist* there is no proof showing the predominance of benefits to one religious group." J.S. App., p. A-27.

The district court also relied on a footnote in the *Nyquist* decision that clearly suggested that the Court would have reached a contrary conclusion had it been reviewing a program of aid for college students that was made available irrespective of the sectarian-nonsectarian or public-nonpublic nature of the institutions attended by those students. 413 U.S. at 782 n.38. The district court's analysis of that footnote, and the authorities cited in the footnote, persuaded it that the challenged Tennessee program had a primary effect that neither advanced nor inhibited religion.

[8] See *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson* v. *Board of Education*, 330 U.S. 1 (1947).

[9] On the same day that it decided *Nyquist*, the Court also invalidated a Pennsylvania program of tuition reimbursement for parents of students attending parochial elementary and secondary schools. *Sloan* v. *Lemon*, 413 U.S. 825 (1973).

The district court found further support for that conclusion in this Court's disposition of the case of *Durham* v. *McLeod*, 192 S.E.2d 202 (1972), *appeal dismissed*, 413 U.S. 902 (1973), the same day that *Nyquist* was decided. At issue in *Durham* was a South Carolina program that provided loans to college students irrespective of whether they attended public or nonpublic, or sectarian or nonsectarian institutions. In rejecting an Establishment Clause challenge to that program, the South Carolina Supreme Court had observed that the program was "scrupulously neutral as between religion and irreligion and as between various religions." 192 S.E.2d at 204. Relying on recent decisions of this Court, the district court ruled that the dismissal of the *Durham* appeal the same day that *Nyquist* was decided was conclusive precedent supporting the constitutionality of the Tennessee program. Thus, the district court concluded:

> "In the instant case, as in *Durham*, the emphasis of the aid program is on the student rather than the institution, and the institutions are free to compete for students who have money provided by the program. No one religion is favored by the program, nor are private or religious institutions favored over public institutions." J.S. App., p. A-31.

Satisfied that the Student Assistance Program had a primary effect that neither advanced nor inhibited religion, the district court entered judgment for the appellees.

ARGUMENT

A. Further Review Is Not Warranted

Over the past six years, few constitutional questions have received the careful scrutiny that this Court has

given to the issue of the Establishment Clause validity of programs of public aid that benefit church-related education. Since 1971, the Court has granted plenary review and written full opinions in nine cases presenting that issue. *Wolman* v. *Walter*, 45 U.S.L.W. 4861 (U.S., June 21, 1977); *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Committee for Public Education* v. *Nyquist, supra; Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973); *Sloan* v. *Lemon*, 413 U.S. 825 (1973); *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). In addition, the Court has summarily affirmed[10] or refused to hear numerous other cases raising the same issue, including two that presented the precise issue posed by this appeal. *Americans United* v. *Rogers*, 528 S.W.2d 711, *cert. den.*, 429 U.S. 1029 (1976); *Durham* v. *McLeod, supra.*

Those many decisions have examined the aid question in a variety of factual contexts, have explored fully the Establishment Clause values and concerns implicit in such aid programs, and have set forth the appropriate constitutional analysis for evaluating the validity of such aid programs. One effect of the Court's exhaustive examination of the public aid issue has been to fix firmly the three-pronged test of purpose, primary effect and excessive entanglement as the basis for as-

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[10] *E.g.*, *Franchise Tax Board* v. *United Americans for Public Schools*, 419 U.S. 890 (1974); *Luetkemeyer* v. *Kaufmann*, 419 U.S. 888 (1974); *Marburger* v. *Public Funds for Public Schools*, 417 U.S. 961 (1974); *Grit* v. *Wolman*, 413 U.S. 901 (1973); *Essex* v. *Wolman*, 409 U.S. 808 (1973); *Brusea* v. *State Board of Education*, 405 U.S. 1050 (1972); *Sanders* v. *Johnson*, 403 U.S. 955 (1971). See also *Wolman* v. *Essex*, 421 U.S. 982 (1975), vacating a district court decision in light of *Meek* v. *Pittenger, supra.*

sessing the constitutionality of institutional aid programs and the "child benefit" analysis as the test of the validity of student aid programs. Another effect of those decisions has been to draw a sharp constitutional line between aid to church-related institutions of higher education and aid to the lower levels of church-related education. *E.g., Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 777 n.32; *Tilton* v. *Richardson, supra,* 403 U.S. at 685-86. As a result, the Court has upheld each program of aid to church-related colleges it has reviewed.[11]

Thus, with respect to the Establishment Clause issue presented by this appeal, this Court has clearly fulfilled its constitutional duty to define the controlling constitutional criteria and to illustrate the application of those criteria in a variety of factual contexts. The time has now come to permit the lower courts to apply those criteria as challenges to new aid programs arise. Any other approach would necessarily require that this Court grant plenary review in every case reaching it which challenges educational aid programs that benefit church-related education directly or indirectly.

These appellees submit that plenary review of this appeal is warranted only if the appellants can demonstrate convincingly that the court below disregarded the controlling constitutional criteria established by this Court or applied those criteria in a manner inconsistent with the fundamental values underlying the Establishment Clause. These appellees further submit, and will demonstrate below, that the appellants have not and cannot make any such showing. Even a cursory reading of the district court's opinion will reveal that

[11] *Roemer* v. *Board of Public Works, supra; Hunt* v. *McNair, supra; Tilton* v. *Richardson, supra.*

it strictly and faithfully adhered to and applied the governing constitutional criteria set forth in this Court's recent decisions. Thus, the decision below should be summarily affirmed.

B. Student Aid Analysis

This Court's decisions on the issue of public aid to church-related education can be divided into two general categories—those involving aid to church-related schools[12] and those involving aid to students attending those schools.[13] The appellants now acknowledge, as the court below explicitly held, that the Tennessee Student Assistance Program is a program of student—and not institutional—aid. Appellants refuse to acknowledge, however, that the constitutional test applied by this Court to student aid programs is more limited in scope than the test applied to institutional aid programs.

The Court has cautioned that the "tests" it has applied in prior Establishment Clause cases should not be rigidly and mechanically applied. "[T]he tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek* v. *Pittenger, supra,* 421 U.S. at 359; see also *Tilton* v. *Richardson, supra,* 403 U.S. at 677-78.[14] The principal evils that the Establishment Clause was in-

[12] *E.g., Roemer* v. *Board of Public Works, supra; Tilton* v. *Richardson, supra; Lemon* v. *Kurtzman, supra.*

[13] E.g., *Board of Education* v. *Allen, supra; Everson* v. *Board of Education, supra.*

[14] *Cf. Wolman* v. *Walter, supra,* 45 U.S.L.W. at 4869-70 (opinion of Powell, J.).

tended to avert are "sponsorship, financial support and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970). Government can avoid those evils only if it remains scrupulously neutral when its actions bring it in contact with religion or religious activities. Mr. Justice Blackmun stated that proposition most forcefully and succinctly in his opinion in *Roemer* v. *Board of Public Works, supra*: "Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity." 426 U.S. at 747. The test of constitutional validity evolved in this Court's student aid decisions assures that such programs will comply with that compelling command of neutrality.

That student aid programs are subject to a different analysis than institutional aid programs is illustrated by such decisions as *Everson* v. *Board of Education, supra; Board of Education* v. *Allen, supra,* and the textbook loan portions of the decisions in *Meek* v. *Pittenger, supra,* and *Wolman* v. *Walter, supra.*[15]

[15] Several factors that are integral to evaluating the constitutionality of institutional aid programs are irrelevant to the analysis of student aid programs. For example, the Court has ruled consistently that pervasively sectarian schools cannot participate in institutional aid programs. *E.g., Meek* v. *Pittenger, supra,* 421 U.S. at 362-66; *Levitt* v. *Committee for Public Education, supra; Lemon* v. *Kurtzman, supra.* Yet, in *Meek* v. *Pittenger, supra,* and *Wolman* v. *Walter, supra,* the Court approved the lending of textbooks to students who attend pervasively sectarian schools. Thus, in student aid programs, unlike institutional aid programs, the religious character of the schools is not a predominant consideration. *Cf. Roemer* v. *Board of Public Works, supra,* 426 U.S. at 766-67 (plurality opinion).

In addition, the entanglement branch of the three-part test applied to institutional aid programs appears to be of no concern in student aid programs. For example, after the Court concluded that the textbook loan program challenged in *Meek* had a valid primary effect, it did not examine whether excessive government entanglement with religion would result from that program. See 421 U.S. at 359-62.

Finally, as is discussed in more detail below, secular use restrictions, which are an essential feature of institutional aid programs, are unnecessary in student aid programs.

To be sure, the fact that the aid is channeled to students or their parents, rather than directly to church-related schools, does not automatically establish a program's constitutional validity. In *Committee for Public Education* v. *Nyquist, supra,* the Court noted that "the fact that aid is disbursed to parents rather than the schools is only one among many factors to be considered." 413 U.S. at 781. But as the Court's opinion in *Nyquist* makes clear, a true student aid program of the sort involved in this case is entirely consistent with the Establishment Clause.

In *Nyquist* the Court reviewed a program of tuition grants available only to parents of nonpublic school students, the vast majority of whom attended denominational, and particularly Roman Catholic, schools. 413 U.S. at 767-68. The Court invalidated that program because it considered the program to be, in reality, a program of aid to sectarian schools. "[I]t is precisely the function of New York's law," the Court concluded, "to provide assistance to private schools, the great majority of which are sectarian . . . . [T]he effect of that aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." 413 U.S. at 783.[16]

[16] Ohio attempted to cast a program of bus transportation to provide field trips for parochial school students as one of student aid. This Court ruled that effort was unavailing. "[T]he schools, rather than the children, truly are the recipients of the service and, as this Court has recognized, this fact alone may be sufficient to invalidate the program as impermissible direct aid." *Wolman* v. *Walter, supra,* 45 U.S.L.W. at 4867.

In reconciling its decision on the New York tuition grant program with the results in *Everson* and *Allen,* the Court in *Nyquist* noted that the benefits of the programs challenged in those earlier decisions were available to "*all* school children, those in public as well as those in private schools." 413 U.S. at 782, n.38. The *Nyquist* Court also cited with approval the decision in *Wolman* v. *Essex,* 342 F. Supp. 399 (S.D. Ohio), a decision which the Court had summarily affirmed. 409 U.S. 808 (1972). In striking down an Ohio tuition reimbursement program for nonpublic school students, the district court had emphasized not only that the benefits were available only to private school students but also that one religious group—Roman Catholics—predominated within that limited class of beneficiaries. 342 F. Supp. at 412."

These considerations prompted the Court to suggest strongly that the result in *Nyquist* would have been different if it were reviewing a student aid program under which the benefits were "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution[s]" attended by the students. 413 U.S. at 782-83 n.38. Indeed, on the same day that *Nyquist* was decided, the Court dismissed for want of a substantial federal question an appeal challenging a South Carolina student aid program that had those precise characteristics. *Durham* v. *McLeod,* 192 S.E.2d 202 (1972), *appeal dismissed,* 413 U.S. 902 (1973).

The court below expressly ruled that the Tennessee Student Assistance Program has all of the characteris-

[17] The district court noted that 95 percent of the students who benefited from the Ohio program attended Catholic parochial schools. 342 F. Supp. at 403.

tics of a constitutionally valid student aid program. The secular objectives of the Program are undisputed and the effect of the Program has been scrupulously neutral in terms of advancing or impeding religion. "[T]he emphasis of the aid program is on the student rather than the institution, and the institutions are free to compete for the students who have money provided by the program. No one religion is favored by the program, nor are private or religious institutions favored over public institutions." J.S. App., p. A-31. In fact, the district court found that, if there is any incentive in the challenged Program to select one type of college over another, the incentive is to select a public institution. *Id.* at n.5.

The district court correctly applied the controlling decisions of this Court in sustaining the constitutionality of the Tennessee Student Assistance Program, and further review of that ruling by this Court is not warranted.

C. Secular Use Restrictions

The appellants insist that an additional requirement must be satisfied for a student aid program to be constitutional. To pass constitutional muster, the appellants argue, a student aid program must "be restricted in such fashion as to guarantee that the State is supporting only the secular portions of the students' education." Juris. Stmt., p. 8; see also *id.* at pp. 12-13. This Court has, of course, ruled that use restrictions of the type described by the appellants are necessary components of institutional aid programs. *E.g., Hunt* v. *McNair, supra,* 413 U.S. at 744; *Tilton* v. *Richardson, supra,* 403 U.S. at 682-84. But no decision of this Court has required that student aid programs contain similar

restrictions. Appellants' argument to the contrary rests on a fundamental misconception of the Court's student aid decisions.

That misconception is most apparent in appellants' reliance on the *Nyquist* decision to support their use restriction argument. As noted above, the Court clearly perceived New York's tuition grant program as an institutional aid program when it asserted that "it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. . . . [T]he effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." 413 U.S. at 783. It was because of that perception that the Court noted the absence of any restrictions to confine the aid to the secular aspects of the sectarian schools that were the real beneficiaries of the contested aid. *Id.* Thus, the *Nyquist* decision provides no support for the appellants' argument that similar use restrictions are essential in true student aid programs.

Nor does appellants' use restriction argument find support in this Court's textbook loan decisions. *Wolman* v. *Walter, supra,* 45 U.S.L.W. at 4863; *Meek* v. *Pittenger, supra,* 421 U.S. at 359-62; *Board of Education* v. *Allen, supra.* It is true that the Court stressed in each of those decisions that only secular textbooks could be loaned to students attending church-related schools. But that aspect of those decisions does not support appellants' claim that use restrictions are essential to student aid programs. The Court's emphasis on the secular nature of the textbooks loaned is simply an acknowledgement that the Establishment Clause imposes an absolute bar to the state's providing religious texts to assist the educational process in either private

or public schools. *Cf. McCollum* v. *Board of Education,* 333 U.S. 203 (1948).

In terms of appellants' use restriction argument, what is significant about the textbook loan decisions is the absence of any concern about the *use* that students in sectarian schools would make of those books. The Court displayed indifference to the use of the textbooks in *Meek* even though the students receiving the books would be attending schools whose "very purpose . . . is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief." 421 U.S. at 366. Similarly, in *Wolman* the Court acknowledged that the students to whom textbooks were loaned attended schools in which it was impossible to "separat[e] the secular education function from the sectarian." 45 U.S.L.W. at 4866. The fact that textbooks provided by public funds could constitutionally be used in educational environments in which religion permeated secular instruction clearly suggests that use restrictions are not essential features of true student aid programs.

The lesson of the textbook aid cases is simply that the aid provided to students attending church-related schools must be secular in nature. That requirement was satisfied in *Wolman, Meek* and *Allen* when the state limited the textbooks it loaned to those that were secular in content. That requirement is also satisfied in this case. Here the state provides money to students to assist them in meeting their college costs, and there is certainly nothing religious or sectarian about money. Whether that money is used to attend a public or nonpublic, sectarian or nonsectarian, college is a matter of the student's choice, and the enabling Tennessee legis-

lation prohibits state officials from influencing that choice in any fashion. J.S. App., p. A-5.

Thus, under this Court's student aid decisions, the aid program challenged by the appellants meets the requirement that the aid provided be secular in nature. Those decisions do not require that a student's use of that aid be restricted,[18] and no such restrictions are necessary in the Tennessee Program.

D. Financing Religious Education

Appellants also argue that the Student Assistance Program violates the Establishment Clause because it assists students in obtaining a religious education. Juris. Stmt., pp. 11-22. That argument is based on faulty factual and legal assumptions.

Appellants initially base their argument on a very generalized observation by the court below that "some, but not all, of the private schools whose students benefited from this program are operated for religious purposes, with religious requirements for students and faculty and are admittedly permeated with the dogma of the sponsoring religious organization." J.S. App., p. A-22. It is impossible to determine from that cryptic statement, which is the only reference in the opinion below to the fact that some private colleges in Tennessee are church-related, which institutions the district court had in mind. The appellants presented evidence about three church-related colleges, and six of the ten intervenors attend colleges that have varying degrees of religious orientations. The testimony of those six

[18] For example, there is no indication that the college student loan program upheld in *Durham* v. *McLeod, supra,* contained any use restriction.

intervenors established that their schools closely resembled those that this Court ruled were eligible for direct institutional aid in *Roemer* v. *Board of Public Works, supra,* and *Tilton* v. *Richardson, supra.* The record in this case is completely silent on whether any of the other 26 private colleges whose students benefited from the aid Program have religious affiliations of any degree.

More importantly, the district court's brief observation about certain unspecified colleges falls far short of holding those colleges provide an education that is religious in nature. That observation simply establishes that some unspecified colleges have certain religious characteristics. But that was also true of the colleges approved for direct institutional aid in the *Roemer* and *Tilton* decisions. Thus, something more is needed to support appellants' claim that the aid Program they challenge assists students in obtaining a religious education.

To overcome that factual deficiency, the appellants resort to the sweeping assertion that "[t]he record is replete with illustrations of the overwhelming sectarianism of . . . three colleges." Juris. Stmt., p. 13. They then refer in a highly selective manner to isolated pieces of evidence about one particular college. Appellants are obviously inviting this Court to conclude that students at that college, at least, receive a religious, rather than a secular, education.

Since the district court chose not to enter any findings concerning the religious characteristics of specific colleges, no useful purpose would be served at this stage of the proceedings to engage the appellants in a detailed debate over the sufficiency of the evidence they

cite to contend that students at the college they have isolated receive a religious education. It is sufficient to note that a review of all of the evidence presented concerning that college would refute that contention.

Even if it is assumed, *arguendo,* that some students receiving Student Assistance awards attend substantially religious colleges, that fact is of no relevance to the constitutional validity of a true student aid program. There was no question that the students receiving the textbook loans in *Wolman* v. *Walter, supra,* and *Meek* v. *Pittenger, supra,* were enrolled in pervasively sectarian parochial schools. But those student aid programs were approved nevertheless. Thus, the district court correctly sustained the constitutionality of the Student Assistance Program irrespective of the religious orientations of colleges attended by students receiving aid under that program.

E. Direct Aid To Sectarian Schools

Finally, and apparently in the alternative, the appellants contend that the Student Assistance Program impermissibly provides direct support to sectarian colleges. Juris. Stmt., pp. 22-26. The basis for that argument appears to be that, because some students attending church-related colleges may choose to pay tuition bills with their awards, the effect of the Program is to channel state funds into some colleges that could not qualify for institutional aid. That argument is as strained as it is frivolous.

There can be no serious dispute, as the district court repeatedly recognized, that the Student Assistance Program is a program of student—and not institutional—aid. It is students—not colleges—who must establish their eligibility for awards. It is students—not colleges—who apply for the awards. It is students—not colleges—who are paid the awards in their own names.

While some award recipients may decide to use part or all of their awards to pay their tuition, nothing in the enabling legislation or regulations governing the Program compels them to do so. Students are required only to use the awards for educationally related expenses. As the district court found, such expenses can and do include room rent, bus fare, clothing and health care. J.S. App., p. A-21. Indeed, the evidence presented to the district court showed that some students used their entire awards for educationally related expenses incurred elsewhere than at the colleges they attended.

Any benefits that a college might realize under the Student Assistance Program are indirect, incidental and haphazard. It is true, of course, that, to the extent that a Student Assistance award permits a person to attend a college he could not otherwise afford to attend, the college will benefit from the additional revenue it receives from that student. But this Court has definitively resolved the question of whether such indirect benefits realized by church-related institutions are impermissible under the Establishment Clause.

> "Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution." *Board of Education* v. *Allen, supra,* 392 U.S. at 244.

That holding in *Allen* is dispositive of appellants' "direct support" argument.

The district court succinctly summarized the purpose and effect of the Student Assistance Program when it stated:

> "In enacting the Tennessee Student Assistance Program, the Tennessee General Assembly sought to provide needy students with the opportunity to attend higher education institutions of their choice, be it public, private, sectarian, or nonsectarian. To ensure that the neutral purpose would not be compromised, the General Assembly enacted a student aid program rather than an institutional aid program." J.S. App., p. A-31.

That student aid program satisfies all of the constitutional criteria set forth in this Court's decisions, and the district court properly found the appellants' constitutional claims to be without merit.

CONCLUSION

For the foregoing reasons, the district court's disposition of appellants' Establishment Clause claim is in harmony with the controlling precedents of this Court, and no substantial question remains to justify plenary review by this Court. The judgment of the district court should be affirmed.

Respectfully submitted,

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